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No. 88-1591

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SANTA FE PACIFIC REALTY CORPORATION,
a Delaware Corporation,
Petitioner,

VS.

CITY OF BERKELEY,
a Municipal Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a landowner may initiate an action in federal court alleging that a land use ordinance as applied to its property effects a taking in violation of the just compensation clause of the fifth amendment without first submitting a development application to a public agency pursuant to the current land use plans and ordinance and receiving a final decision applying these regulations to the development application.

2. Whether the Ninth Circuit may reject conclusory allegations that submitting a development application pursuant to an ordinance specifying uses and intensity of development would be futile when the court finds that the local agency has discretion to apply the challenged ordinance flexibly.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent City of Berkeley respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

The City of Berkeley ("City") commences its Opposition Brief with this second Statement of the Case because Santa Fe, in its Statement of the Case, has taken manifold liberties with the facts. Santa Fe has omitted essential relevant facts, misrepresented facts alleged, and portrayed legal conclusions as factual allegations.[1] What follows is a correction of erroneous statements, a more balanced presentation of the relevant planning and legal history, and a fuller description of the land use plans and ordinance at issue in this case.

The City's Planning Process For The Waterfront.

Santa Fe's Petition for Writ of Certiorari ("Petition") repeatedly asserts that during the past twenty years it has unsuccessfully "pursued every conceivable avenue available to it" to gain City approval of "some reasonable and economically viable use of its [Berkeley Waterfront] property." Petition at 4; *see also id.* at 3, 5, 9, 10. Santa Fe's account of efforts to develop this privately-owned stretch of the Berkeley Waterfront, on the San Francisco

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[1] The Statement of the Case in Santa Fe's Petition for Writ of Certiorari is riddled with legal conclusions masquerading as factual statements. *See, e.g.,* Petition at 3 ("The unalterable terms of the ordinance are so restrictive that they preclude any economically viable development of Santa Fe's property"); 9 ("[T]he maximum development permitted by Measure Q was confiscatory"); and 11 ("[T]he confiscatory development limits in voter- imposed Measure Q could not be amended by the City Council even if Santa Fe filed an application"). The Ninth Circuit has repeatedly stressed that a court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex. rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986). *See also Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

Bay, misleads the court by suggesting that the City has spent the last twenty years rejecting Santa Fe's development proposals. *Id.* at 3. In fact, almost all of the last twenty years has been devoted to litigation between the City and Santa Fe and to the City's recent three year planning process that resulted in the plans and ordinance challenged herein.

Before the City's recent planning efforts for the Waterfront began, there had never been a systematic attempt to formulate goals and policies to guide development of this area. CR 19, Exh. 2 at 89.[2] In 1951, the City's Waterfront had been rezoned from "Industrial" to "Unclassified," a zoning designation which allowed any type of development consistent with the City's Master Plan. *Id.* at 85, 89. During the 1950's, the City received proposals to fill substantial portions of the San Francisco Bay off the Berkeley shoreline for non-water-related uses. *Id.* at 86. The public strongly opposed such proposals, leading the City Council to solicit alternative proposals. *Id.* at 85-86.

Against this backdrop, the City in 1970 received a proposal to develop a regional shopping center on that portion of Santa Fe's property known as the Meadow. After the City rejected this large-scale development proposal, the property owners, George Murphy and Santa Fe, sued the City in inverse condemnation for twelve million dollars each. The state of California entered the case, raising the issue of the extent of the public trust on the Meadow property which was former tideland that had been filled after Santa Fe's predecessors acquired the property from the state. CR 19, Exh. 2 at 87. This litigation spanned more than ten years during which time the parties focused upon the court proceedings, awaiting guidance from the California Supreme Court as to whether Santa Fe's property holdings along Berkeley's shoreline were free of the public trust. The court's resolution of the public trust issue would define the range of permissible uses of the Waterfront area. *See City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362, *cert. denied*, 449 U.S. 840 (1980); *see also* CR 19, Exh. 2 at 87.

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[2] Citations to CR are to the Clerk's Record in the Court of Appeals.

Once the public trust issue was resolved and the case settled, Santa Fe and the City began discussions in the spring of 1982 regarding future development of Santa Fe's waterfront property. CR 1 at ¶ 28. At this time, Santa Fe announced its intent to develop more than four million square feet of commercial space on its waterfront property. CR 19, Exh. 2 at 89.

Thereafter, in the spring of 1983, the City initiated its formal public-planning process that would culminate, three years later, in the adoption of the Waterfront Plan Amendment to the City's Master Plan ("Waterfront Plan") and the Waterfront Specific Plan ("Specific Plan").[3] CR 19, Exhs. 2 and 3 respectively; *see also* Order Dismissing Complaint issued by the United States District Court for the Northern District of California ("Order"), *reprinted in* Appendix to Petition ("App.") at A-14, A-15.

This planning process included a lengthy series of studies, analyses, workshops, and public hearings. *See generally*, CR 19, Exh. 2 at 89-93; Order, App. at A-15. The City analyzed a number of difficult issues, including traffic congestion, environmental constraints, scenic impacts, economic effects, and preservation of open space along the shoreline of the East Bay. CR 19, Exh. 2 at 35-74.[4] The City also solicited development proposals from a broad range of individuals and organizations in the Berkeley community. *Id.* at 89.

The purpose of this process was to devise a comprehensive plan for the only large undeveloped area remaining in the City, to protect the interests of the citizens of Berkeley, and to assure a reasonable financial return to Santa Fe. *Id.* at 1-2, 4-7, 92. In regard to the latter goal, the City was mindful throughout the planning process that its development restrictions could not deprive Santa Fe of its constitutionally guaranteed property rights:

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[3] The City's Opposition Brief refers collectively to these two plans as "the Waterfront Plans."

[4] A list of the many reports prepared by the City during the development of the Waterfront Plan is found at CR 19, Exh. 2 at 107-08.

> Special attention was given to the economics of Waterfront development, to assure that the plan would allow for a reasonable economic return to the property owner.

Id. at 92. In furtherance of that effort, City consultants prepared economic feasibility analyses. *Id.* at 90. During the latter half of 1985 and 1986, the City Council considered a variety of development alternatives presented by its consultants as well as an environmental impact report which analyzed the potential adverse impacts of these development alternatives. *Id.* at 92-93. *See also id.* at 120 (CEQA Findings rejecting less intense development alternatives as potentially economically unviable).

Santa Fe's "applications" were submitted to the City prior to and during this three year planning process. *See* Petition at 4-6; Order, App. at A-19 to A-20. The City, in order to complete its planning process before evaluating and acting upon Santa Fe's applications, resorted to a well-accepted planning tool. It adopted time-limited moratoriums on the issuance of permits for Santa Fe's property, thereby postponing consideration of premature development proposals until the City could adopt a comprehensive plan for the affected area. These consecutive, short-term moratoriums were in effect from June 4, 1985 until July 31, 1986. CR 1 at ¶¶ 42, 45, 48; Order, App. at A-16. They were enacted under the express authority of California law. Cal. Gov't Code § 65858 (West 1983).

The Waterfront Plans And Measure Q.

On October 7, 1986 the City Council adopted the Waterfront Plans. CR 1 at 54. These planning documents conform to state law, both in their content and specificity. Both plans provide a detailed list of policies establishing development parameters for Santa Fe's undeveloped waterfront property. The plans do not address the already developed portions of the Waterfront owned by the City.[5]

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[5] During the 1960's, the City expanded its Yacht Club along the Berkeley Waterfront, first established in the 1920's, with a loan from the State Small Craft and Harbor Department. One term of the loan repayment was the requirement that the City develop restaurants and a

The Waterfront Plan is an amendment to the City's master or general plan. *See* Cal. Gov't Code §§ 65300, 65350 (West Supp. 1989).[6] The general plan may be adopted as a group of documents relating to geographic segments of the planning area. *Id.* § 65301(b). Proper planning as well as logic dictates that the City should plan for this large parcel of undeveloped land as one discrete unit.[7]

The Specific Plan was prepared in order to implement the general plan in the waterfront area. Cal. Gov't Code § 65450. As required, the Specific Plan is consistent with the City's master plan. *Id.* § 65454. Moreover, the Specific Plan was prepared according to the detailed requirements of state law which mandate the contents of specific plans. *Id.* § 65451(a). Thus, specific plans must include, inter alia, the distribution, location, and extent of the uses of land, including open space, within the area covered by the plan. The proposed distribution, location, and extent and intensity of major components of public and private transportation, sewage, water, drainage, solid waste disposal, energy and other essential facilities must also be detailed in the specific plan. *Id.*[8]

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hotel on City property in the vicinity of the yacht harbor. The City complied with this requirement, leasing space for the establishment of a hotel and two restaurants. CR 19, Exh. 2 at 85.

[6] The contents of the master or general plan are mandated by state law. Each such plan must contain seven elements. Cal. Gov't Code § 65302. Moreover, "[t]he degree of specificity and level of detail of the discussion of each such element shall reflect local conditions and circumstances." *Id.* § 65301(c).

[7] Santa Fe places great importance on the fact that Measure Q and the Waterfront Plans are directed solely at Santa Fe's property, suggesting that this fact somehow evidences the unlawfulness of the challenged legislative enactments. *See, e.g.*, Petition at 4, 5, 7, 12. That the process affected only Santa Fe's property is merely an unintended consequence of the fact that Santa Fe is the owner of all of the undeveloped waterfront property in the City.

[8] Santa Fe makes much of the "highly detailed requirements and restrictions" (Petition at 6) found in the Specific Plan, suggesting that such specificity relieves Santa Fe of its duty, under the finality doctrine,

The Specific Plan also contains detailed provisions governing applications to develop Santa Fe's property (a "Master Development Plan") pursuant to the Specific Plan. CR 19, Exh. 3, Section 7.3. The City's Planning Commission reviews and thereafter issues its decision either approving or disapproving any application for a Master Development Plan. *Id.* Section 7.3.9. The Planning Commission's decision may be appealed to the City Council. *Id.* Section 7.3.11.

In November 1986, one month after the adoption of the Waterfront Plans, the voters enacted a complementary initiative, Measure Q. (For the text of Measure Q, see App. at A-44 to A-49.) The City's November 1986 ballot, in fact, contained two proposed ordinances governing development of Santa Fe's waterfront property.[9] Ballot arguments and campaign literature referred to the second ballot measure, Measure P, as "the citizen's initiative," to distinguish it from Measure Q which had been placed on the ballot by the Berkeley City Council.[10] App. at A-54. (For the text of Measure P, see App. at A-34 to A-37.)

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to file a meaningful development application. Of course, Santa Fe is unable to cite any authority for the proposition that the City's compliance with relevant planning statutes brings Santa Fe within the narrow futility exception to the ripeness requirement.

[9] If a ballot contains two or more initiatives with conflicting provisions on the same subject, the measure which receives the most votes becomes law. App. at A-39. In this case, both Measure Q and Measure P passed, the former receiving more votes and thus becoming the law.

[10] Ironically, given Santa Fe's portrayal of Measure Q throughout this litigation, the ballot arguments in support of Measure P and against Measure Q depict the latter ordinance as "the pro-development Measure 'Q'." App. at A-39. These ballot arguments assert that Measure Q "locks in the large-scale development sought by pro-development planners, consultants, and politicians. . . ." App. at A-53. The ballot argument against Measure Q cautions "Don't be deceived. Measure Q was placed on the ballot to allow large-scale development on the Meadow. Don't let pro-development politicians and planners turn our magnificent open space waterfront into a Miami Beach-By-The-Bay." *Id.*

The findings adopted by the citizens of Berkeley as a part of Measure Q state that it is in the public interest to preserve and protect the open space, views, wetlands, beaches, and low density character of the waterfront area of the City. Measure Q, Section 1, App. at A-44. In addition, the measure states that a portion of the waterfront area constitutes environmentally sensitive and irreplaceable wetlands, meadows, marshes, and wildlife habitat. *Id.*[11]

Measure Q sets a development maximum of 565,000 square feet on Santa Fe's property (Measure Q, Section 3, App. at A-46) subject to constitutional limitations. *Id.* Section 5, App. at A-48. The ordinance specifies where on the property the allowable development may be located, with some flexibility given to the City to locate development elsewhere on Santa Fe's property if necessary. *Id.* Section 3, App. at A-45 to A-47.

Section 7 of Measure Q provides that the ordinance shall not be amended, except by a vote of the people. *Id.* Section 7, App. at A-48. Finally, the ordinance specifies that it shall not be construed as authorizing the City to exercise its power in a manner which will take or damage private property for public use. Measure Q, by its explicit terms, is not intended to increase or decrease the rights of any owner of property under the Constitution of the United States or the state of California. *Id.* Section 5, App. at A-48.

Proceedings Below.

Santa Fe initiated this action four months after the voters of Berkeley enacted the challenged Measure Q. It alleged that the Waterfront Plans and Measure Q effect a taking as applied to its property in violation of the just compensation clause of the fifth amendment of the United States Constitution. Santa Fe also alleged denial of due process and equal protection under the

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[11] The Environmental Impact Report prepared on the Waterfront Plans (CR 19, Exh. 2 at 93) identified 17 acres of seasonal ponds on the Meadow area as a migratory bird habitat. Such species of waterbirds as the endangered brown pelican and the California least tern frequent Santa Fe's Waterfront site. App. at A-39.

fourteenth amendment and deprivation of civil rights under 42 U.S.C. section 1983. Petition at 1. Santa Fe has been unwilling to submit a Master Development Plan application to the City and thereafter to participate in the planning process envisioned by the Specific Plan. CR 19, Exh. 3, Section 7.3. Instead, following the enactment of the waterfront planning measures, Santa Fe chose to go directly to federal court seeking massive monetary damages against the City for alleged deprivations of its constitutional rights.

The City filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), challenging the court's subject matter jurisdiction over the entire action on the grounds of ripeness. After hearing oral argument by the parties, the District Court ultimately determined that this case fits comfortably within all of the recent Supreme Court and Ninth Circuit precedents. The court dismissed Santa Fe's entire complaint because it had "not yet obtained a final regulatory determination regarding the development of its property, and thus has failed to present the court with a justiciable controversy." Order, App. at A-14.

The District Court's order dismissing Santa Fe's complaint contained a number of findings which are of particular relevance to Santa Fe's pending Petition. First, the District Court found that the development applications and proposals that Santa Fe submitted to the City during the period preceding the City's enactment of the challenged Waterfront Plans and Measure Q do not satisfy the final decision requirement. *Id.* at A-19 to A-21. The District Court reasoned:

> "The required submission of at least one meaningful development application prior to bringing suit presumes that the preceding application is made pursuant to the current zoning ordinances and procedures; otherwise, there can be nothing final about the challenged regulatory act, since it represents the product of a regime no longer governing the decisions of the planning authority."

Order, App. at A-20.

Second, the District Court rejected Santa Fe's alternative claim that Measure Q and the Waterfront Plans represent the City's

final adjudication of Santa Fe's earlier development applications, noting that this argument "significantly misconstrues the express terms of the 1986 enactments." *Id.* at A-21. The court reasoned that Measure Q's Section 5, by its plain language, explicitly vests discretion in City officials to alter the type and intensity of development allowed on Santa Fe's property if the landowner could demonstrate *during the application process* that the development limits specified in the City's 1986 enactments "interfered with its reasonable investment-backed expectations." *Id.* at A-22.

Finally, in stark contrast to Santa Fe's searing indictment of the City, the District Court found that the record did not demonstrate that the City had engaged in "an unfair tactical ploy to avert litigation." *Id.* at A-21 n.2. The City had not manipulated the zoning process by either enacting new ordinances each time Santa Fe submitted a development application or indefinitely imposing moratoriums on use permit applications. Indeed, in 1986 the City rezoned Santa Fe's property for the first time since 1951, and then only after a three-year planning process in which Santa Fe and the public "played a significant part." *Id.*

Santa Fe appealed the District Court's dismissal of its claims. On August 29, 1988, the United States Court of Appeals for the Ninth Circuit issued its unpublished memorandum decision, affirming the District Court's dismissal for lack of subject matter jurisdiction.[12] Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit ("Memorandum"), *reprinted in* App. at A-26. The Ninth Circuit, relying on both Ninth Circuit and Supreme Court precedent, held that Santa Fe could not demonstrate that the City had rendered "a final and authoritative determination of the type and intensity of development

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[12] The Ninth Circuit's memorandum decision addressed only the taking claim. *See* App. at A-26. Neither the District Court nor the Ninth Circuit ruled on the facial validity of the regulations, as Santa Fe failed to pursue this issue in the District Court in its opposition to the City's motion to dismiss Santa Fe's entire action. *See* discussion in Appellee's Ninth Circuit Brief at 41-44. Santa Fe's petition for certiorari is limited to the issue of whether the Ninth Circuit properly determined that the ripeness doctrine bars consideration of Santa Fe's takings claim as applied to its property. Petition at i.

legally permitted on [its] property." *Id.* at A-28 (quoting *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986)). Noting that Santa Fe had failed to submit a meaningful application under Measure Q, that is, one that is not for "exceedingly grandiose development," the court refused to recognize Santa Fe's claim that submission of an application would be futile. *Id.* at A-29 & n.1. As the District Court had already concluded, the Ninth Circuit determined that Section 5 of Measure Q provided the City with discretion to apply the ordinance's terms flexibly. *Id.* at A-30 n.3.

Following the court's affirmance of the District Court's dismissal, Santa Fe petitioned for rehearing on September 12, 1988. Ten days later, Santa Fe wrote to the Ninth Circuit advising the court that the September 13, 1988 modification of its decision in *Herrington v. County of Sonoma*, 857 F.2d 567, *modifying* 834 F.2d 1488 (9th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3621 (Mar. 20, 1989), directly related to Santa Fe's petition for rehearing. The Ninth Circuit subsequently ordered the City to file a response to the petition for rehearing. App. at A-31.

In responding to Santa Fe's petition for rehearing, the City primarily focused on the Ninth Circuit's recent revision of the ripeness portion of its opinion in the *Herrington* case. The City's brief elucidates why the Ninth Circuit's earlier dismissal of Santa Fe's claim was still entirely consistent with the court's explication of the ripeness doctrine in *Herrington*. Answer to Appellant's Petition for Rehearing at 2-8.

The City's answer to the petition for rehearing notes that the City has developed a Master Development Plan application, based on the Waterfront Plans, which gives full effect to Measure Q. *Id.* at 10-11; *see id.* Exh. A (Master Development Plan application). In particular, an applicant seeking to develop the Waterfront property presently owned by Santa Fe must provide data to support any claim that the 565,000 square feet of development permitted on Santa Fe's property under Measure Q would result in a taking of the property. *Id.* at 11. If the Master Development Plan application reveals that the economic assumptions the City utilized in establishing the Waterfront Plans' density and use limits were erroneous, Section 5 of Measure Q

would require the City to alter these limits so as to enforce the ordinance in a way that would not effect a taking of Santa Fe's property. *Id.* at 10-11.

After considering Santa Fe's Petition for Rehearing, the City's Answer, and, presumably, the modification in *Herrington*, the Ninth Circuit on January 3, 1989 denied Santa Fe's Petition for Rehearing. App. at A-32.

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit's Determination That Santa Fe's Takings Claim Is Not Ripe For Judicial Review Presents No Issues Meriting Supreme Court Review.

A careful reading of Santa Fe's Petition leads to one conclusion —Santa Fe's quarrel is with the result in this particular case rather than with the Ninth Circuit's formulation of the ripeness doctrine. Although Santa Fe attempts to depict the Ninth Circuit decision in this case as exemplifying an aberrant trend in the circuit, the Ninth Circuit's holding that Santa Fe has not presented a concrete controversy ripe for judicial review is merely a fact-specific determination that Santa Fe has not obtained a final decision as to the level of development the City will permit on Santa Fe's property. Because this determination rests on the application of established ripeness rules to a particular set of facts, this case provides no significant issues meriting Supreme Court review.

1. The Ninth Circuit And District Court Rulings That Santa Fe's Action Is Premature Adhere To This Court's Ripeness Decisions.

Santa Fe's broad attack on the Ninth Circuit, while itself unfounded, is particularly unwarranted in this case. The determination that Santa Fe has not presented a concrete controversy ripe for review flows directly from Supreme Court precedent.

The Ninth Circuit, in an unpublished memorandum decision affirming the District Court, concluded that the court lacked jurisdiction to hear Santa Fe's claim because Santa Fe had not yet obtained a final decision as to the type and intensity of

development permitted on its property. *See* Memorandum, App. at A-26 to A-30. This decision faithfully follows the rule established by this Court that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). This Court has further clarified that the ripeness requirement is not satisfied unless the landowner has obtained "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). Both the District Court and the Ninth Circuit determined that, on the facts of this case, Santa Fe had not obtained the requisite final and authoritative determination because it has never submitted a development application under the challenged regulations. *See* Order, App. at A-14 to A-24; Memorandum, App. at A-26 to A-30.

In insisting that Santa Fe submit a development application, the Ninth Circuit followed a clear line of Supreme Court precedent. This Court has made clear that landowners challenging an ordinance as effecting a taking of their property present no concrete controversy for the court to adjudicate until they have submitted a development application under the challenged ordinance. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). More recently, the Court has held that landowners have not satisfied the final decision requirement until they have also sought available variances. *Williamson*, 473 U.S. at 187-90 (no final decision where landowner failed to seek available variances after rejection of development application). Moreover, the application must be "meaningful"; rejection of "exceedingly grandiose development plans" does not necessarily constitute a final decision. *MacDonald*, 477 U.S. at 352 n.8, 353 n.9 (taking claim premature where landowner had submitted an application for intensive development but had failed to submit less intensive development proposal that county might approve). The District Court and Ninth Circuit relied on these Supreme Court pronouncements in requiring that Santa Fe submit at least one development application before

invoking the court's jurisdiction. *See* Order, App. at A-18; Memorandum, App. at A-28.

Disagreeing with the lower courts' application of settled law to the facts presented by this action, Santa Fe accuses the Ninth Circuit of deviating from this Court's mandate by employing a mechanical approach. *See, e.g.,* Petition at 13. The only arguments which Santa Fe offers to support this criticism, however, reflect a fundamental misunderstanding of the ripeness doctrine. Santa Fe argues that the Ninth Circuit should have excused Santa Fe from submitting even one application because the challenged ordinances are "confiscatory" and because the regulations are themselves a final determination of the permissible level of development. Petition at i, 11, 18-19. Both arguments, if followed by any federal court, would eviscerate the final decision requirement.

The underlying premise of Santa Fe's ripeness claim is its conclusory allegation that Measure Q is confiscatory. Santa Fe describes the ordinance as "confiscatory" throughout its petition, as if this legal conclusion were a proven fact. *See* Petition at i, 3, 9, 11, 18. Santa Fe confuses the ripeness inquiry and the takings inquiry. *See* Petition at 15-16 & n.7 (mistakenly implying that the absence of a set formula for determining whether a taking has occurred justifies a flexible approach to ripeness). To determine whether a land use regulation effects a taking of a property interest, courts must engage in "ad hoc, factual inquiries" into the particular circumstances of each case. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *MacDonald*, 477 U.S. at 349. The factual nature of the takings inquiry, however, is precisely the reason for the Supreme Court's insistence on the prerequisite of a final decision. As this Court has summarized, "a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348; *See also Williamson*, 473 U.S. at 189 n.11 ("[a]bsent a final decision. . . it is impossible to tell whether the land retained any reasonable beneficial use or whether respondent's expectation interests had been destroyed").

Despite this clear distinction between the factual inquiry on the merits and the threshold jurisdictional inquiry, Santa Fe advo-

cates reaching the merits, namely whether an ordinance is confiscatory, to determine whether the final decision requirement is satisfied. *See, e.g., id.* at 17-19. What Santa Fe apparently fails to understand is that a court cannot prejudge whether the level of development permitted under an ordinance "confiscates" a particular property interest until the court knows exactly how much development the governing entity will allow. The final decision determination, of necessity, turns only on the question of whether a permitting authority has arrived at a final and authoritative determination of the level of development permitted on the property at issue. *MacDonald*, 477 U.S. at 348.

Thus, the Ninth Circuit correctly refused to base jurisdiction only on an interested party's interpretation of the very regulation it is challenging. The court adhered to this Court's ripeness decisions when it recognized that it could not determine whether the challenged regulations were in fact confiscatory until Santa Fe submits an application to the City so that the City has an opportunity to apply the ordinance to a particular development proposal.

The Ninth Circuit and District Court also correctly held that Santa Fe cannot claim that an application would be futile merely because the terms of the Waterfront Plans and Measure Q are specific. Although Santa Fe treats this holding as another instance of the Ninth Circuit's alleged "rigid and mechanical ripeness standard," Petition at 19, the Ninth Circuit's decision here too is in accord with Supreme Court precedent.

In *MacDonald*, this Court made clear that a landowner's allegation of futility will not satisfy the final decision requirement if a possibility remains that a governing body will implement its regulation so as to permit development sufficient to survive constitutional scrutiny. 472 U.S. at 352 & n.8. In that case, the landowner had already submitted a development application for intensive residential development on its property and had alleged in state court that further applications would be futile. *Id.* at 352 n.8. The Court accepted the state court's conclusion that requiring an application for less intensive residential development would not be futile because "a meaningful application had not yet been made." *Id.* Similarly, citing *MacDonald*, the Ninth Circuit re-

fused to accept Santa Fe's claim of futility because Santa Fe had not submitted even one application—let alone a meaningful one—under the challenged regulations. Memorandum, App. at A-29.

Requiring Santa Fe to submit a meaningful application following the City's adoption of the Waterfront Plans gives full effect to the Court's directive that federal courts not second-guess how a governing body will in fact respond to a development proposal. In *MacDonald*, this Court indicated that a prediction of an agency's behavior in lieu of an actual decision on a development application does not satisfy the final decision requirement. 477 U.S. at 351. The county in that case had rejected the developer's first application for residential development on the grounds that street access, sewer and water services, and police protection were inadequate; however, the fact that the county's general plan and zoning ordinances technically permitted residential development was enough to dismiss the landowner's allegation that a subsequent application would be futile. *Id.* at 342-43, 352 n.8. The landlord's allegation of futility was "conclusionary" because the county regulations, "*for aught that appears*, would allow development to proceed." *Id.* at 352 n.8 (emphasis added). As in *MacDonald*, the Ninth Circuit correctly refused to base jurisdiction on a mere prediction of futility controverted by the plain terms of the challenged regulation. As Judge Patel, writing for the District Court in this case, aptly stated, "[p]laintiff asks the court to look past the express terms of the enactments and divine their true intent and impact . . . [but] there is simply no circumstance where the court can substitute its speculative judgment for the determination of a planning authority presented with an actual development application." Order, App. at A-22.

MacDonald further teaches that a court should avoid constitutional adjudication of a takings claim if the problem could be solved by another development application; the Court found the landowners' takings claim premature because they had not yet availed themselves of procedures that could potentially permit some development. 477 U.S. at 352-53. Thus, in affirming the district court's dismissal of Santa Fe's claim, the Ninth Circuit faithfully followed the dictates of this Court when it determined

that the ripeness doctrine requires Santa Fe to give the City an opportunity to apply its regulations in a manner that will not effect a taking. Memorandum, App. at A-29. Santa Fe distorts this reasoning by treating the court as having decided that an application would be futile "as a practical matter." *See* Petition at i, 11. The court never found that an application would in practice be futile. Indeed, the court determined that an application would not be futile because the terms of Measure Q give the City discretion to apply the ordinance flexibly. Memorandum, App. at A-29 to A-30 & n.3. The court only determined that it would not preempt the City's decision-making process by accepting Santa Fe's mere allegations of futility.[13] *Id.* at A-29 to A-30 & n.3.

The legal standards which the District Court and the Ninth Circuit applied in this case present no issues meriting Supreme Court review. The uniqueness of this case derives not from the legal standards applied but from the lengthy controversy between the parties to this action which the District Court and Ninth Circuit properly reviewed in light of settled law.

2. The Decision In This Case Provides No Basis For Legal Generalizations.

Even if the Court were interested in reviewing its ripeness standard in regulatory takings cases, this case would be a poor vehicle for such review because the Ninth Circuit's decision hinges on its interpretation of facts that are not easily generalized for application in other contexts. Although Santa Fe attempts to find a legal hook to justify Supreme Court review, the major issues in this case are whether Santa Fe submitted a meaningful application and whether submission of such an application would be futile, both factual questions specific to this case.

The Supreme Court need not retrace the exhaustive factual analysis that led both the District Court and the Ninth Circuit, exercising *de novo* review, to conclude that Santa Fe has not

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[13] As the Ninth Circuit explained elsewhere, "waiting for a final determination increase[s] the possibility of [the developer and public agency] finding a mutually acceptable solution." *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986).

attempted to obtain a final decision as to the level of development the City will permit under the regulations.[14] *See, e.g.*, Order, App. at A-14 to A-17; Memorandum, App. at A-26 to A-27. The conclusion reached by both courts, that Santa Fe presents no concrete controversy, is fully justified by the record in this case.

The undisputed record reveals that Santa Fe never submitted a development application under the very land use regulations it challenges as effecting a taking of its property. *See* Order, App. at A-19 to A-20; Memorandum, App. at A-29. Santa Fe obfuscates this pivotal fact by making sweeping generalities and leveling serious, albeit unsubstantiated, charges against the City while omitting relevant facts.[15] *See* Petition at 4-5. For example, Santa Fe refers to a rejected 1970 development proposal but omits mention of the fact that it thereafter initiated litigation against the

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[14] Contrary to Santa Fe's assertion that a court must accept its factual allegations as true, *see* Petition at 2, 24, the court was permitted to weigh the evidence. While a court must accept factual allegations as true when judging the sufficiency of the pleadings for purposes of ruling on a motion to dismiss for failure to state a claim, as a general rule the court "may inquire . . . into the facts as they exist" when ruling on a motion challenging the court's subject matter jurisdiction. *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947). Where, as here, the motion to dismiss is pursuant to Federal Rule of Civil Procedure 12(b)(1), "no presumptive truthfulness attaches to plaintiff's allegations . . . . [and] the plaintiff will have the burden of proof that jurisdiction does in fact exist." *Thornhill Publishing Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d. 884, 891 (3d Cir. 1977)). This rule applies when the jurisdictional facts are not intertwined with the merits. *Id.* The rule is applicable in this instance because the jurisdictional question, whether Santa Fe has obtained a final decision as to the permissible level of development, is separate from the question of whether the permissible level of development constitutes a taking.

[15] Santa Fe's Petition largely repeats the unsupported, inflammatory allegations of its complaint, treating them as if they are adjudicated facts. Santa Fe's unsubstantiated claims include accusing the City of acting "in bad faith," (Petition at 4), "manipulating the process to ensure that Santa Fe's applications would ultimately be denied," (*id.* at 5), and rejecting these applications "on sham grounds" (*id.*).

City which lasted for over a decade. *See City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362, *cert. denied*, 449 U.S. 840 (1980); *see also* CR 19, Exh. 2 at 87 (Waterfront Plan's description of litigation). During this extended period, there was no proposal under consideration by the City for development of Santa Fe's property holdings along the shoreline.

The other development proposals to which Santa Fe alludes (*see* Petition at 4-6) preceded the completion of the City's extensive planning process which culminated in the City's enactment of the Waterfront Plans and the voters' approval of Measure Q. CR 19, Exhs. 2 and 3; Order, App. at A-15 to A-17. Although Santa Fe attempts to characterize that planning process as a delaying tactic, *see* Petition at 4-5, the process was a serious effort to develop, for the first time, policies governing the one large remaining undeveloped tract in the City. CR 19, Exh. 2, at 89. The process took three years, not an unduly long time to solicit input from public and private interests, formulate appropriate development standards, and conduct an environmental review of the Waterfront Plans. One of the primary purposes of the process, in which Santa Fe played a significant part, was to provide "an appropriate amount of private development to make the Waterfront part of a vibrant urban community." *Id.* at 1.

While the City was in the midst of formulating a detailed land use plan for the Waterfront, Santa Fe attempted to preempt and disrupt the process by filing development applications with the City. Ultimately, so that the City could complete the planning process before approving or rejecting a specific application, the City imposed temporary moratoriums on development permits. CR 1 at ¶¶ 42, 45, 48; Order, App. at A-16.

These actions by the City provide no determination as to the level of development permitted under the challenged regulations, as Santa Fe's proposals preceded enactment of the Waterfront Plans and Measure Q. *See, e.g.*, Order, App. at A-14 to A-17, A-19 to A-20; Memorandum, App. at A-26 to A-27. Santa Fe accuses the Ninth Circuit of requiring "one *more* application," *see, e.g.*, Petition at 15, 21, 26 (emphasis added), when in fact, as the Ninth Circuit found, Santa Fe has yet to submit even a first

application under the challenged regulations. Memorandum, App. at A-29. Further, the City's response to Santa Fe's proposal for more than four million square feet of development cannot be considered a final determination of the type and intensity of development the City will permit. Santa Fe has not yet provided the City with a meaningful application; its proposal for nearly eight times the square footage specified in the regulations certainly does not qualify as meaningful.

Reflecting precisely the flexibility which Santa Fe claims is absent, the District Court noted that it would not blindly require Santa Fe to submit a development application under a new zoning regime if the City had "manipulate[d] the zoning process" as a tactical ploy to avert litigation. Order, App. at A-21 n.2. The record indicated, however, that the City had not acted to deny Santa Fe an opportunity to obtain a final determination from the City on the development it would allow on Santa Fe's waterfront property. Arriving at the same conclusion, the Ninth Circuit found that to present a concrete controversy, Santa Fe must first establish that "*after* Measure Q was adopted, a specific development plan was rejected." Memorandum, App. at A-28 (emphasis added).

Similarly, in rejecting Santa Fe's futility argument, the Ninth Circuit and the District Court relied on the specific history between the parties and the terms of the regulations themselves. As even Santa Fe's present petition reveals, Santa Fe's real disagreement is not with the court's approach to the ripeness doctrine but with its assessment of the fact-specific issue of whether the Waterfront Plans and Measure Q fix the terms of development or give the City flexibility. *See, e.g.,* Petition at 17-19. The District Court and the Ninth Circuit have already resolved this question against Santa Fe, based not on a mechanical approach to ripeness but rather on a careful reading of the regulations.

Santa Fe relies on an unsubstantiated legal conclusion to justify its failure to submit an application under the challenged regulations; it argues that the City never intended to use the planning process to allow development of the property. *See* Petition at 5. The terms of the regulations belie this claim. Because the City

intended to ensure a reasonable economic return to Santa Fe, *see* CR 19, Exh. 2 at 92, it established baseline terms that it believes will provide Santa Fe economically beneficial use of the property. Further, if the City's economic assumptions were to prove incorrect and the adopted Waterfront Plans were not to allow economically viable development of the property, Measure Q provides the City discretion to alter the permissible level of development if necessary to prevent a taking. Measure Q, Section 5, App. at A-48. Measure Q's Section 7 requiring voter approval of amendments to the ordinance does not nullify this grant of discretion because the voters authorized the City to apply the ordinance in such a way as not to deprive Santa Fe of its constitutionally guaranteed property rights. *Id.* Section 7, App. at A-48. Only after examining these provisions of the Waterfront Plans and Measure Q did the district and appellate courts reject Santa Fe's claim that an application would be futile. *See* Order, App. at A-21 to A-22; Memorandum, App. at A-30 n.3.

The Ninth Circuit explicitly indicated that the City's discretion to apply the terms of Measure Q flexibly was important to its conclusion that Santa Fe could not invoke futility. Memorandum, App. at A-30 n.3. In view of the Ninth Circuit's reasoning, Santa Fe distorts the decision by claiming that the Court of Appeals would insist on an application "no matter how certain it may be" that such a step would be futile. *See* Petition at 21. The sole evidence which Santa Fe offers for this misrepresentation of the decision is another distortion: that Santa Fe had succeeded in showing that Measure Q was a final determination. *Id.*

As the foregoing review of the Ninth Circuit and District Court rulings makes clear, the decision in this case rests on detailed analysis of a planning process and regulations unique to this case. Because this analysis cannot be generalized beyond the facts of this case, Supreme Court review would serve no purpose but to provide Santa Fe yet another hearing on the facts. The Supreme Court need not expend scarce judicial resources on this task when the District Court and the Ninth Circuit have already scrutinized the facts and correctly rejected Santa Fe's self-serving reading of the City's land use regulations governing its property.

B. The Ninth Circuit's Application Of The Ripeness Doctrine Is Entirely Consistent With The Holdings Of This Court And Other Circuits.

Santa Fe attacks not just the outcome in this case but the Ninth Circuit as a whole. *See* Petition at 19-26. In making this sweeping attack, Santa Fe reads the case law selectively and impugns the judicial integrity of the circuit. An accurate reading of the cases does not support Santa Fe's broad generalizations. Contrary to Santa Fe's claim, the Ninth Circuit's approach does not result in needless postponement of ripe claims. *See, e.g.*, Petition at 15. The circuit has not hesitated to find takings claims ripe for review where the facts of the case demonstrate that further attempts to seek a final decision would be futile. *See, e.g., Hoehne v. County of San Benito*, No. 87-2825, slip op. 2391 (9th Cir. Mar. 15, 1989); *Herrington v. County of Sonoma*, 857 F.2d 567, *modifying* 834 F.2d 1488 (9th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3621 (Mar. 20, 1989).

Acknowledging these ripeness decisions, as it must, Santa Fe then contradicts itself by complaining of the "divergence of authority" on the circuit, an argument which Santa Fe supports only by its unwarranted accusation that landowners are "at the mercy of the panel" which hears their case. Petition at 19. In fact, Ninth Circuit case law reveals that the circuit, consistent with both this Court's pronouncements and those of other circuits, requires that a landowner either pursue available means of obtaining a final decision or demonstrate that such steps would be futile.

1. The Ninth Circuit Requires Landowners To Obtain A Final Decision As To The Type And Intensity Of Development Permitted On Their Property.

The so-called "Ninth Circuit approach" to which Santa Fe objects merely implements the directives of this Court by requiring a landowner to obtain a rejected development plan and a denial of a variance before challenging the constitutionality of a land use regulation. *See, e.g., Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 876 (9th Cir.), *cert. denied*, 109 S. Ct. 79 (1988); *Lai v. City & County of Honolulu*,

841 F.2d 301, 303 (9th Cir.), *cert. denied*, 109 S. Ct. 560 (1988); *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375, 377-79 (9th Cir.), *cert. denied*, 109 S. Ct. 134 (1988); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454-55, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988). These decisions follow directly from the Supreme Court's opinion in *Williamson* where the Court held that a landowner had not obtained a final decision because it had failed to apply for available variances after the county in that case had rejected the landowner's development application. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-90 (1985).

This approach is not unique to the Ninth Circuit. In complete accord with the Ninth Circuit, other circuits have held challenges to land use regulations premature on the grounds that landowners had not submitted a development plan or sought variances. *See, e.g., Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988) (remanding taking claim to district court to address whether city's grant of a variance is likely and thus whether claim is premature); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir.) (holding constitutional challenge to zoning and annexation decisions unripe because developer had made no formal application and thus had obtained no final decision), *cert. denied sub nom. Alter v. Schroeder*, 109 S. Ct. 226 (1988); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) (holding taking claim premature where landowners had not sought a variance and thus had not obtained a final decision).

Not only is Santa Fe wrong in accusing the Ninth Circuit of deviating from this Court's and other circuits' decisions, Santa Fe also misrepresents the standard which the Ninth Circuit employs. *See, e.g.*, Petition at 13-26. In those cases where the Ninth Circuit found a constitutional challenge to a land use regulation premature because landowners had not submitted a development plan or applied for a variance before filing suit, the record demonstrated that these avenues of relief were available. *See Lake Nacimiento Ranch Co.*, 841 F.2d at 876 (as applied taking claim premature because county had suggested ways to remedy the deficiencies in landowners' informal development proposal); *Lai*, 841 F.2d at

303 (takings claim not ripe because landowners had failed to seek a variance which past experience indicated could be obtained); *Shelter Creek Development Corp.*, 838 F.2d at 379 (takings claim not ripe because planning commission's testimony indicated it would "permit some deficiencies in various requirements"); *Kinzli*, 818 F.2d at 1452 & n.2 (takings claim premature because landowners had abandoned their only application and had never applied for special use permits allowed under the terms of the ordinance). Although Santa Fe asserts that the Ninth Circuit employed a mechanical and rigid approach in deciding these cases, *see* Petition at 19-20, elsewhere in its petition Santa Fe admits that these cases were correctly decided because each involved a land use regulation that gave the administrative body "discretion to take some meaningful action in response to a development application or variance request." *Id.* at 11-12.

By contrast, the circuit has not insisted on denial of a formal development application and denial of a variance where doing so serves no purpose. *See Barancik v. County of Marin*, No. 87-1982, slip op. 4055, 4062 (9th Cir. Apr. 19, 1989); *Herrington v. County of Sonoma*, 857 F.2d 567, 569-70, *modifying* 834 F.2d 1488 (9th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3621 (Mar. 20, 1989). In *Herrington*, the court did not define the application requirement rigidly; rather, it pragmatically evaluated whether the Herringtons could claim that the county had rejected a development application. Even though the landowners had never formally completed a development application, the court held that they had satisfied the "rejected development plan" prong of the final decision standard because the county had definitively rejected the Herringtons' incomplete proposal as inconsistent with the general plan. *Id.* at 569.

The Ninth Circuit in *Herrington* also held that landowners need not apply for a variance where the facts indicate that a variance is not "a legally viable option." *Id.* at 570. Although Santa Fe downplays *Herrington* by relegating it to footnotes, *see* Petition at 14 n.6, 20 n.9, the *Herrington* decision evidences the very sensitivity to the facts underlying a takings claim that Santa Fe contends is lacking in the Ninth Circuit.

Similarly, in a decision issued since Santa Fe filed its present Petition, the Ninth Circuit held that a constitutional challenge to a denial of a rezoning application was ripe even though the landowner had not sought a variance. *Barancik*, No. 87-1982, slip op. at 4062. A denial of a variance was not necessary to establish ripeness because the record did not indicate that a variance was available. *Id.*

In light of these cases, the fact that the City has stated that Santa Fe need not apply for a variance to satisfy the final decision requirement is not a "fatal" concession, as Santa Fe claims in its present Petition. *See* Petition at 12. The City has always maintained that Santa Fe's claim is premature not because the company failed to seek a variance but because it has failed to submit even one application under Measure Q when that ordinance allows development. *See, e.g.*, CR 12, at 6-19. The Ninth Circuit apparently did not disagree with this conclusion; it denied Santa Fe's petition for rehearing subsequent to the circuit's modification of *Herrington* and the City's briefing of the issues raised by that case. *See* Answer to Appellant's Petition for Rehearing at 2-8 (discussing implications of modified *Herrington* decision).

2. The Ninth Circuit Does Not Require Landowners to Engage In Futile Efforts To Obtain A Final Decision.

The Ninth Circuit does not insist that landowners pursue every technically available avenue of relief if doing so "would be an 'idle and futile act.' " *Kinzli v. City of Santa Cruz*, 818 F.2d at 1454 (quoting *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983)). Nevertheless, when challenging a regulation as effecting a taking of their property, landowners cannot come within the futility exception simply by arguing that no economically viable development is possible under the ordinance. Such an argument would force the court to reach the merits of the case in the absence of a concrete controversy, thus eviscerating the ripeness requirement. As the Ninth Circuit explained in *Kinzli*,

> We reject the . . . view that futility may be determined, absent any rejected development plan, by inquiring whether

> any beneficial use remains or whether the regulatory regime inhibits the property's marketability. Adoption of such standards would require courts to speculate as to what potential uses may be lurking in the hopes of the property owner and in the minds of developers and city planners. This would result in the same sort of speculation that the ripeness doctrine prohibits.

818 F.2d at 1454. Although a landowner can avoid exhausting all avenues of relief by demonstrating that the permitting authority has definitively determined the level of development it will approve, the landowner must first submit a "meaningful application" before claiming that further efforts to obtain a final and authoritative determination would provide no further clarification and thus be futile. *MacDonald*, 477 U.S. at 352 & n.8; *Kinzli*, 818 F.2d at 1455.

Although Santa Fe objects to this reasoning as creating "a standard in [the Ninth Circuit's] dominant line of cases which can never be satisfied," Petition at 23, Santa Fe glosses over the fact that the Ninth Circuit in several recent cases did indeed find that landowners had satisfied the futility exception. *See Hoehne v. County of San Benito*, No. 87-2825, slip op. 2391 (9th Cir. Mar. 15, 1989); *Herrington v. County of Sonoma*, 857 F.2d 567, *modifying* 834 F.2d 1488 (9th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3621 (Mar. 20, 1989). Both cases undercut Santa Fe's argument that the Ninth Circuit employs a rigid and mechanical approach to ripeness. Santa Fe hedges by implying that these decisions differ from the "dominant" line of cases. Petition at 23. Rather than representing a divergence of authority in the circuit, these decisions evidence differing outcomes resulting from application of the same established principles to the particular facts of each case. Further, these opinions are no less "dominant" than others and will probably be more influential on subsequent case law than the unpublished memorandum decision in the case at bar.

Hoehne and *Herrington* show that the Ninth Circuit, without further instruction by the Supreme Court, will hear a takings claim if landowners have demonstrated that they received what amounts to a final determination as to the acceptable use of their

property, even if they have not exhausted all avenues of relief. In *Hoehne*, the court emphasized that its determination that the landowners' taking claim was ripe for review turned on the record facts. *Hoehne*, No. 87-2825, slip op. at 2399. The facts showed that a county had rejected the Hoehnes' subdivision application and then immediately downzoned their property. The court reasoned that the landowners had no available avenues of relief, as the county supervisors would not rezone the property to permit the desired development. *Id.* at 2403. The Ninth Circuit held that on these facts, "any further attempt by the Hoehnes to seek relief from the County would have been futile." *Id.* at 2394.

Similarly, in *Herrington*, the facts showed that requiring landowners to submit further applications to the county in that case would have been futile. 857 F.2d at 569-70. The Ninth Circuit found the Herringtons' constitutional challenge ripe because the county had already rejected one application on the grounds of inconsistency with the general plan and county planners had testified that the landowners "had no chance" of obtaining a general plan amendment, the landowners' only available avenue of relief. *Id.* at 569. Explicitly noting that its decision was "based upon repeated and uncontradicted testimony by county officials that the Herringtons' 32-lot proposal could not have obtained approval," the court emphasized that "mere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility." *Id.* at 570.

Significantly, the Ninth Circuit had the opportunity to reconsider its decision in this case in light of *Herrington*, as Santa Fe's petition for rehearing was before the court when the court published its modified opinion in *Herrington*. After considering the City's discussion of the implications of *Herrington* for Santa Fe's futility claim, *see* Answer to Appellant's Petition for Rehearing at 2-8, the court denied a rehearing of the case. App. at A-32.

Contrary to Santa Fe's attempt to characterize the Ninth Circuit as the lone aberration, *see, e.g.*, Petition at 17, 22, no circuit has applied the futility exception where the developer has not submitted an application and thus has not received a final and authoritative determination of the permissible level of develop-

ment. The Seventh Circuit explicitly relied on *Kinzli* and endorsed its reasoning. *Unity Ventures v. County of Lake*, 841 F.2d 770, 775-76 (7th Cir.), *cert. denied sub nom. Alter v. Schroeder*, 109 S. Ct. 226 (1988). Rejecting the developers' claim of futility because the landowner had not submitted a development application in that case, the Seventh Circuit explained,

> If the plaintiff had presented a formal application . . . , then the Village could have made a reasoned decision. . . . And if the Village still denied the application, a court would have a basis on which to evaluate the impact and extent of the Village's denial. At this point, it is simply impossible for a court to determine how the Grayslake Board of Trustees or the Lake County Board would have acted on a formal application, or whether or to what extent the plaintiffs have been harmed.

Id. at 776. The Tenth Circuit has similarly rejected a landowner's claim of futility where the landowner had made no attempt to "pursue compromise with the City that would allow some level of development." *Landmark Land Company of Oklahoma v. Buchanan*, Nos. 85-2458, 85-2538 (10th Cir. Nov. 30, 1988) (1988 U.S. App. LEXIS 16105, 11).

The Eleventh Circuit cases which Santa Fe cites in an effort to demonstrate a conflict among the circuits are also compatible with the Ninth Circuit's reasoning in its ripeness cases. *See* Petition at 17. The Eleventh Circuit in *A.A. Profiles v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3682 (Apr. 17, 1989), employs the same reasoning as the Ninth Circuit in *Hoehne*. In *A.A. Profiles*, the landowner had submitted an application for proposed development which the city conditionally approved. When the landowner violated the conditions of approval, the city temporarily suspended the approval and subsequently rezoned the property. *Id.* at 1485. As in *Hoehne*, the rezoning definitively prevented the landowner from pursuing its proposed business and thus provided the court with a final determination on which to base its takings inquiry. *Id.* at 1487. Similar to the Ninth Circuit in *Herrington*, the Eleventh Circuit has not required a landowner to seek a variance to satisfy the final decision requirement where the city conceded that seeking a

variance would have been futile under the terms of the ordinance. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1516 & n.3 (11th Cir. 1987).

Santa Fe also glosses over a key distinction between these cases and its own; in the Eleventh Circuit cases, the city's actions occurred *after* the city had taken action on a development application. *A.A. Profiles*, 850 F.2d at 1485 (city initially approved company's wood-chipping business); *Corn*, 816 F.2d at 1515 (city denied approval of landowner's site plans).

Given the lack of merit in Santa Fe's characterization of the Ninth Circuit, Santa Fe makes a last ditch effort to save its claim by attacking the judicial integrity of the Ninth Circuit. Petition at 14, 19. Santa Fe's suggestion that the results in Ninth Circuit cases depend on the composition of the panel is wholly unwarranted, as the Ninth Circuit's rulings in all its ripeness cases properly require a final decision on which the trial court can base its evaluation of a takings claim.

Further, any suggestion that the Ninth Circuit is split is also factually wrong insofar as the same judges have ruled differently in different cases. One example is the case at bar. Judge Choy, one of the members of the panel holding Santa Fe's claim premature, authored the *Herrington* decision accepting the landowners' claim of futility. *See Herrington*, 857 F.2d 567 (9th Cir. 1988) (Choy, J.). *Compare, also, Lai v. City and County of Honolulu*, 841 F.2d 301 (9th Cir.) (Schroeder, J., joined by Skopil, J. and Aldisert, J.) (dismissing complaint as unripe because landowner failed to apply for a variance), *cert. denied*, 109 S. Ct. 560 (1988) *with Hoehne v. County of San Benito*, No. 87-2825, slip op. 2391 (9th Cir. Mar. 15, 1989) (Aldisert, J., joined by Brunetti, J. and Leavy, J.) (holding complaint ripe because further attempts to seek relief from county would have been futile).

As this review of Ninth Circuit case law makes clear, Santa Fe's attempt to blame the outcome of its case on a rigid or, alternatively, conflicting Ninth Circuit approach finds no support in the cases. The Ninth Circuit dismissed Santa Fe's claim for lack of ripeness, despite precedent for a finding of futility, because

the facts showed that Santa Fe does not yet have a final decision from the City on the permissible level of development. Whereas in *Hoehne* and *Herrington* the court had concrete information as to how much development would be permitted because no further application would change the permitting authority's determination, the District Court and the Ninth Circuit in Santa Fe's case concluded that the City had not issued any definitive determination of the degree of development it will permit on Santa Fe's property. Because avenues of relief exist under the terms of the Waterfront Plans and Measure Q that Santa Fe has not pursued, the Ninth Circuit correctly affirmed the District Court's determination that Santa Fe's regulatory takings claim is not ripe for judicial consideration.

CONCLUSION

For all of the foregoing reasons, this Court should deny Santa Fe's petition for certiorari.

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Respectfully submitted,

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